83-1308

NO.

IN THE

SUPREME COURT of the UNITED STATES

October Term, 1983

OWEN R. JONES,
Petitioner

v.

JOHN O. MARSH, SECRETARY,
DEPARTMENT OF THE ARMY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT SEEKING DISCRETIONARY REVIEW OF THE ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRUCE P. ZALMAN
440 South Seventh Street
Louisville, Kentucky 40203
(502) 589-6607

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether a mere statement by the Petitioner, upon which the decisions of the United States Merit Systems Protection Board and 6th Circuit Court of Appeals are exclusively based, is sufficient to constitute substantial evidence within the meaning of The Substantial Evidence test, especially in light of the fact that evidence to the contrary, offered by Petitioner, overwhelmingly outweighs the significance of such statement.

2. Whether the decisions of the Merit System Protection Board and 6th Circuit Court of Appeals which are based on evidence outside of the record violated Administrative Procedure Act 5 U.S.C. §§ 556 (E) and Petitioners due process rights guaranteed by the United States Constitution.

TABLE OF CONTENTS

1. TABLE OF AUTHORITIES

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

OWEN R. JONES PETITIONER

VS.

JOHN O. MARSH, SECRETARY
DEPARTMENT OF THE ARMY RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of The Supreme Court of the United States.

Owen R. Jones, The Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, for the Sixth Circuit, entered in the above-entitled case on August 2, 1983.

II. OPINIONS BELOW

The denial of Petitioner's request for a rehearing before the Sixth Circuit Court of Appeals is reproduced as Appendix D to this Petitioner, infra, page A-35.

The opinion of the United States Court of Appeals for the Sixth Circuit is unreported and is reproduced as Appendix C to this Petition, infra, page A-21.

The decision of the Merit Systems Protection Board is reproduced as Appendix B to this Petition, infra, page A-13.

The holding of Mr. Vesser, the Merit Systems Protection Board Hearing Officer, is reproduced as Appendix A to this Petition, infra, page A-1.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on August 2nd, 1983. A timely petition for rehearing was denied on September 19, 1983. The jurisdiction of This Honorable Court is invoked pursuant to 28 U.S.C. §§1254 (1) and 5 U.S.C. §7703 (b)(A)(1) and (b)(1).

IV. TABLE OF STATUTES

28 U.S.C. §1254 (1) provides, in pertinent part, that [c]ases in the court of appeals may be reviewed by the Supreme Court. . . [b]y writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

5 U.S.C. §7703 (b) provides, in pertinent part,

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit

Systems Protection Board may obtain judicial review of the order or decision.

(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the Court of Claims or a United States Court of Appeals as provided in chapters 95 and 158, respectively, of title 28. Notwithstanding any other provision of law, any petition for review must be filed within 30 days after the date the petitioner received notice of the final order or decision of the Board

5 U.S.C. §556 E states [T]he transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official

notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

V. STATEMENT OF THE CASE

On March 31, 1983, the Department of the Army effected a reduction-in-force (RIF) action pursuant to an Area Maintenance Support Activity classification study whereby the Petitioner, Owen Jones, was demoted from the position of Mobile Equipment Mechanic, WG-10, to Automotive Worker, WG-8. Petitioner Jones appealed the RIF action to the Atlanta Regional Office of the United States Merit Systems Protection Board (MSPB). His initial appeal was dismissed because he filed prior to the effective date of the Army's RIF action. Petitioner then filed a second appeal, after the effective date of the agency's action, contending (1) his former position had not in fact been

abolished since he continued to perform the same duties and functions he had prior to the RIF action, and (2) that his classification reduction was unfair because he was reduced in seniority and qualification to a grade level below that of other men in his working unit who were less qualified and had less seniority.

After considering all of the evidence, the MSPB Hearing Officer, S.F. Vesser, concluded that the Department of the Army failed to establish, by a preponderance of the evidence, that the RIF procedure was invoked for the legitimate purposes of abolishing or reclassifying as a result in a change of duties the former position of Petitioner Jones where Mr. Jones established he was performing the same duties and functions as prior to the RIF action.

The Respondent, the Department of the Army, appealed the Hearing Officer's decision

alleging it did show a proper basis for invocation of the RIF procedure. The MSPB granted the Army's petition for review and reversed its initial decision by Hearing Officer Vesser, holding that (1) Mr. Jones no longer tore down and rebuilt components and assemblies for engines, transmissions and differentials and that eliminated certain "major" duties from Jones' former WG-10 position, therefore, the Army's invocation of the RIF procedure was proper, and (2) that Petitioner Jones' assignment rights were not adversely affected due to the Army improperly crediting Mr. Jones' lengthy seniority and outstanding performance ratings.

Owen Jones petitioned the United States Court of Appeals for the Sixth Circuit pursuant to 5 U.S.C. §7703 to reverse the final MSPB decision.

The Court of Appeals, in its August 2, 1983 order, held that: (1) there was

substantial evidence to support The Board's conclusion that Respondent, Secretary, Department of the Army, made a prima facie case that the RIF procedure was properly invoked under our facts, and (2) substantial evidence supported the conclusion that there was such a significant change in duties to warrant the reduction in grade of Petitioner Jones. Furthermore, it held that since there was no objection on the Appellate record to new and additional evidence that the MSPB may have considered, "this Court takes cognizance of the entire record which may or may not include something more than the 'retention register' and 'a copy of the reduction-in-force notice' referred to by Officer Vesser as previously noted." (Order of the United States Court of Appeals for the Sixth Circuit, filed August 2, 1983).

Petitioner, Owen Jones, respectfully petitions this Honorable Court for a Writ of Certiorari to review the decision of the Sixth Circuit Court of Appeals.

ARGUMENT I

TO BE UPHELD UPON JUDICAL REVIEW, AN ADMINISTRATIVE AGENCY'S DECISION MUST BE SUPPORTED BY SUBSTANTIAL EVIDENCE AND A MERE STATEMENT BY THE PETITIONER, UPON WHICH THE DECISIONS OF THE UNITED STATES MERIT PROTECTION BOARD AND 6TH CIRCUIT COURT OF APPEALS ARE EXCLUSIVELY BASED, DOES NOT CONSTITUTE SUBSTANTIAL EVIDENCE WITHIN THE MEANING OF THE SUBSTANTIAL EVIDENCE TEST, ESPECIALLY IN LIGHT OF THE FACT THAT EVIDENCE TO THE CONTRARY, OFFERED BY PETITIONER, OVERWHELMINGLY OUTWEIGHS THE SIGNIFICANCE OF THAT STATEMENT.

The Court of Appeals, in its opinion upholding the MSPB's decision, failed to apply the rule of Universal Camera Corp. v. NLRB, 340 U.S. 474 (1955) as interpreted by subsequent decisions. The rule states that for an administrative agency's decision to be upheld upon judicial review, it must be supported by substantial evidence. In explaining the substantial evidence test,

the Supreme Court held:

> We do not require that the examiner's findings be given more weight than in reason and in the light of judicial experience they deserve. The "substantial evidence" standard is not modified in any way when the Board and its examiner disagree. We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in the particular case. To give it this significance does not seem to us more difficult than to heed the other factors which in sum determine whether evidence is "substantial." (emphasis added) Universal Camera, Supra.

In Brewer v. United States Postal Service, 647 F. 2d 1093 (Ct. Cl. 1981), Cert. denied 102 S. Ct. 1005, a United States Postal Service employee was discharged by the Postal Service on the

grounds that he falsified another employee's time card and removed a piece of third class mail from the post office in violation of the Postal Service Manual. Brewer challenged his discharge by arguing the Merit System Protection Board's decision was not supported by substantial evidence. The Court of Claims held "under the Statutory standard of review, the Court will not overturn an agency decision if it is supported by 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Consolidated Edison Co. v. NLRB, 305 U.S. 197, 59 St. Ct. 206, 216, 83 L. Ed. 126 (1938). That Court also held "in determining whether the Board's decision is supported by substantial evidence, the standard is not what the Court would believe on a de novo appraisal, but whether the administrative determination is supported by substantial

evidence on the record as a whole." Pascal v. United States, 211 Ct. Cl 183, 543 F. 2d 1284, 1287 (1976). The MSPB discharge was upheld because the Board's decision was based on (1) affidavits made by Petitioner and (2) on a Postal Inspector's corroborating investigative memorandum. The Board as trier of fact had the right to judge the credibility of the witnesses and to reject Mr. Brewer's explanation. In our case, Mr. Vesser was the trier of fact and judge of credibility. In addition, in Alers v. United States, 633 F. 2d 559 (Ct. Cl. 1980), a woman challenged her discharge from the Internal Revenue Service on the ground there was no supporting evidence supporting that particular charge for dismissal. The Court of Claims found substantial evidence supported to discharge where (1) Alers admitted altering data of statements and having a

co-worker affix an IRS Agent's name to a unauthorized letter and, (2) even though Alers testified she had no intent to falsify, the Court held since the hearing officer had opportunity to observe her demeanor and made a determination as to her credibility, the Court could not say he acted unreasonably in disbelieving Plaintiff. The Court held considering Alers's admissions together with the hearing officer's rejection of her explanation, the hearing officer could have reasonably concluded Alers altered the documents for the purpose of intentionally falsifying them. Alers admission coupled with the rejection of her explanation amounted to substantial evidence.

The above cases illustrate the deference given hearing officers or triers of fact when issues of credibility are involved. The critical issue in this case is whether

Petitioner Jones performs the same duties. Hearing Officer Vesser had the Opportunity to observe the demeanor of and to hear the testimony of the witnesses. He found no reason that justified Petitioner's reduction in grade.

As for the Court of Appeals upholding of the agency's action, it appears to have overlooked that its role in reviewing the final administrative agency's decision is to insure it is supported by substantial evidence. As the Court in Carr v. United States, 337 F. Supp. 1172 (N.D. Col, 1972) stated, that does not mean "the court will uphold the agency's finding on the basis of any evidence." Substantial evidence means more than a mere scintilla.

The Court of Appeals stated the admission by Petitioner Jones that he does not now tear down and rebuild components

and assemblies even though he did so in the past on an emergency basis as required constitutes substantial evidence. But can a reasonable man conclude that Petitioner's duties have changed when taking his statement in context? The tearing down and rebuilding of components and assemblies was never a regular daily duty of Mr. Jones. That specific function was usually referred to Fort Knox. (Appendix E). Petitioner Jones only performed such duties occasionally as required by an emergency. (Appendix E). Although Mr. Jones is not presently tearing down and rebuilding components and assemblies, his testimony at the MSPB hearing indicated that "an engine was put in a tank in Madisonville by two WG-8's, a shop foreman and a MATS man, G.S. MATS man, and the heavy mobile equipment repairman was still in the

Louisville shop performing his normal duties" subsequent to the RIF action effective date and that he (Mr. Jones) will and expects to perform such duties, as before, occasionally as required by an emergency. (Appendix E).

The thrust of Hearing Officer Vesser's decision was that according to the evidence introduced, the agency failed to demonstrate by a preponderance of the evidence that the RIF Procedure was properly invoked for those legitimate management reasons alleged. He found, in substance, that the agency merely reduced the wage grade of Petitioner Jones without abolishing his former position or eliminating a "major" duty. The evidence beyond a reasonable doubt proved that the tearing down and rebuilding of components and assemblies was, at most, a very minor duty performed on an as required basis. Having heard the

evidence and seen the witnesses, Hearing Officer Vesser, who is best qualified to decide, found the Agency failed to meet its burden of persuasion. Unless error is clearly shown, the MSPB should be reluctant to disturb his findings. Universal Camera Corp. v. National Labor Rel. Bd., supra, Weaver v. Depart. of the Army, 2 MSPB 297 (1980). Hearing Officer Vesser's findings should be given the weight warranted by the record and by the strength of his reasoning.

In Brewer and Alers, supra, the agency's decisions were upheld by the reviewing Courts as being based on substantial evidence when there was some sort of admission plus a finding of fact by the triers of fact that supported the agency's decision. In this case, Hearing Officer Vesser's findings do not support the agency's decision. Therefore, the agency's decision is not supported by

substantial evidence and there exists a conflict as to what constitutes substantial evidence among the Federal Courts.

ARGUMENT II

THE DECISIONS OF THE MERIT SYSTEM PROTECTION BOARD AND THE 6TH CIRCUIT COURT OF APPEALS, WHICH ARE BASED ON EVIDENCE OUTSIDE OF THE RECORD, VIOLATED ADMINISTRATIVE PROCEDURE ACT, §'5 U.S.C §556 (E) AND PETITIONERS DUE PROCESS RIGHTS GUARRANTEED BY THE UNITED STATES CONSTITUTION.

Petitioner Jones, appealed from the MSPB's written decision. That decision was, to our knowledge, based on the evidence admitted during the initial hearing before Mr. Vesser. The Army made an attempt to add new and additional evidence before the MSPB but Petitioner's counsel made a written objection to such (Appendix F). If the MSPB considered evidence outside of the record, then it violated Administrative Procedure Act, §'5 U.S.C. §556 (E) which states, "The transcript of testimony and exhibits, together with all papers and requests filed in the proceedings, constitues the exclusive

record for decision . . ." Furthermore, if the Court of Appeals considered evidence outside the record, then it also violated §556 (E) and Petitioner's due process rights. In Morgan v. United States, 298 U.S. 468, 56 S. Ct. 906, 80 L. Ed. 1288 (1936), ("Morgan I"), the United States Supreme Court held an agency's decision must be based upon the evidence and argument presented at the hearing. Otherwise, the individual's rights of confrontation and due process are violated. Just prior to oral argument, Petitioner's Counsel realized that the MSPB decision may have been based on evidence objected to and not made available to him. Furthermore, the Court of Appeals decision suggests it was based on evidence that was objected to before the MSPB and that was objected to during oral argument of this case before the Sixth

Circuit Court of Appeals. This clearly violates Petitioner Jones' rights of due process and confrontation. If Administrative Procedure Act §556(e) and the rights of confrontation and due process are to have substantive meaning, then this Honorable Court should grant Petition a Writ of Certiorari to remedy the injustice he has suffered.

CONCLUSION

It is submitted that if the MSPB's decision or that if this Court's Order was based on evidence Petitioner objected to in his letter to the MSPB or at the Appellate oral argument and of which Petitioner was not aware, then his right of due process and confrontation was violated. Furthermore, when considering the full context of Petitioner's testimony, the affadavits of his co-workers, and the conclusion of

Hearing Officer Vesser, a sole statement that Petitioner no longer perfoms a duty that he previously did on an emergency, as required, basis does not constitute substantial evidence. By concluding so, the 6th Circuit Court of Appeals decision conflicts with other Federal Courts as to what constitutes substantial evidence.

Therefore,Petitioner Jones respectfully requests this Honorable Court to grant this Petition for Writ of Certiorari.

BRUCE P. ZALMAN
440 South Seventh Street
Louisville, Kentucky 40203
502/589-6607

Counsel for Petitioner

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was this 3rd day of ~~January~~ February, 1984, mailed to Ronald E. Meredith, U. S. Attorney, Room 211, U.S. Post Office and Courthouse, 601 West Broadway, Louisville, Kentucky 40202; ATTENTION: Michael F. Spalding, Assistant U. S. Attorney.

Bruce P. Zalman

BRUCE P. ZALMAN

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

OWEN R. JONES PETITIONER

VS.

JOHN O. MARSH, SECRETARY
DEPARTMENT OF THE ARMY RESPONDENT

PETITIONER'S APPENDIX

MSPB:SFV:cdc

August 21, 1980

Department of the Army
Attention: Civilian Personnel Office
Fort McCoy
Sparta, Wisconsin 54656

Dear Sir:

Enclosed is a copy of the initial decision in the appeal described below.

Appeal of: Owen R. Jones

Action appealed: Reduction in force

Initial decision: Agency action reversed

Sincerely yours,

S.F. VESSER
Presiding Official

Enclosures

cc:

Mr. Owen R. Jones
4309 Flhur Drive
Louisville, Kentucky 40216

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA FIELD OFFICE

Owen R. Jones

v.

Department of the Army

Initial Decision Number AT035109057

Date_____

INTRODUCTION

By a petition dated April 22, 1980, Mr. Owen R. Jones, the appellant, submitted an appeal from a reduction-in-force (RIF) action taken by the Department of the Army (the agency). The RIF action was effected on March 31, 1980, and resulted in the appellant's change to lower grade from the position of Mobile Equipment Mechanic, WG-10, to the position of Automotive Worker, WG-8, at Bowman Field, Louisville, Kentucky. The Personnel Action Form (SF-50)

effecting the RIF action is annotated to show that the appellent is entitled to the retained grade of WG-10 through March 31, 1982.

JURISDICTION

The appeal is governed by the provisions of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978). Under the Reform Act, the Board has authority to hear and decide all matters within the Board's jurisdiction, as conferred by law, rule, or regulation. 5 U.S.C. 1205(a)(1) and 7701. Included in the Board's appellate jurisdiction are appeals from those actions from which jurisdiction properly may be granted by regulation of the Office of Personnel Management (OPM). While there is no statutory right of appeal from reduction-in-force actions, OPM regulations provide that reduction-in-force actions are appealable to the Board. 5 C.F.R. 351.901.

FINDINGS AND CONCLUSIONS

Under the Reform Act and the Board's regulations, the agency has the burden of establishing by a preponderance of the evidence that the reduction-in-force action was properly taken. 5 U.S.C. 7701(c)(1)(B). The agency's evidentiary burden includes proof that the RIF regulations were properly invoked due to management considerations of the character appropriately committed to agency discretion. The permissible reasons for initiating a RIF actions are set out in 5 C.F.R. 351.201(a). These reasons are "lack of work, a shortage of funds, reorganization, reclassification due to change in duties, or the exercise of reemployment or restoration rights." The term "reorganization," is defined as "the planned elimination, addition, or redistribution of functions or duties in an organization." 5 C.F.R. 351.203(f).

With respect to the burden of proof in RIF appeals, the Board, in its decision in the case of Losure v. Interstate Commerce Commission, MSPB No. DC035199008 (June 2, 1980), stated the following:

> The agency may establish a prime facie case on this element of its decision by coming forward with elements showing a RIF undertaken for any of the reason specified in 5 C.F.R. 351.201(a). If the employee presents no rebuttal evidence to challenge the bona fides of the agency's alleged reason for the RIF, the agency's initial evidence would normally suffice to meet also the burden of persuasion of this element of its decision. Once the agency makes out a prima facie case, the burden of going forward with

rebuttal evidence shifts to the employee, but the burden of persuasion or precisely, the risk of non persuasion never shifts from the agency. Thus, where credible evidence either in the employee's rebuttal presentation or in the agency's own admission, is sufficient to cast doubt on the bona fides of the RIF, the agency may find it advisable to present additional evidence to meet its burden of persuasion. But whether the agency presents such additional evidence or not, the burden remains on the agency to persuade the Board by a preponderance of the evidence that the RIF regulations were in fact invoked for one the legitimate management reasons specified in 5 C.F.R. 351.201(a).

The "element of its decision" referred to by the Board in the quotation set forth above refers to the agency's burden of proof that the RIF regulations were properly invoked due to management considerations of the character appropriately committed to agency discretion.

In the instant case, the agency apparently contends that the appellant's position was abolished as the result of the implementation of a classification study. However, the only evidence in support of the agency contention that the appellant's position was abolished is the annotated retention register for the appellant's competive level (tab 2, agency file).

The appellant contends that his position has not in fact been abolished, but that he is still performing the same duties and functions in his current position as an Automotive Worker, WG-8, as he performed in his former position as a Mobile Equipment Mechanic, WG-10.

Thus, the appellant's rebuttal to the agency's contention is sufficient to raise a question of the bona fides of the RIF.

The preponderance of evidence standard is defined in the Board's regulations as follows:

> That degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true. 5 C.F.R. 1201.56(c)(2).

I find that the retention register indicating that the appellant's position was abolished, and the copy of the reduction-in-force notice indicating that the reduction in force was due to the implementation of a classification study are insufficient evidence to establish a prima facie case that the reduction-in-force regulations were properly invoked due to

management considerations of the character appropriately committed to agency discretion.

One may infer from the retention register and/or the RIF notice that the appellant's position was abolished. However, in light of the appellant's specific assertion that he is still performing the same duties, thus essentially claiming that his position was not abolished, the burden of persuasion is on the agency to show that the position was abolished, by presenting evidence showing the basis for the abolishment. This, the agency has failed to do. Thus, the agency has not met its burden of persuasion that the appellant's position was abolished or that the appellant's position was reclassified as the result of a change in duties. Accordingly, I find that the agency has failed to establish, by a preponderance of the evidence, that the RIF regulations were, in fact, invoked for one of

the legitimate reason specified in 5 C.F.R. 351.301(a).

DECISION

The reduction in force action is reversed.

NOTICE

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on SEP 24, 1980, unless a petition for review is filed with the Board or the Board reopens the case on its own motion.

Any party to the proceeding, the Director of the Office of Personnel Management, and the Special Counsel may file a petition for review of this decision with the Merit Systems Protection Board. The petition for review must set forth objections to the initial decision, supported by references to applicable laws or regulations, and with specific references to the record.

The petition for review must be filed with the Secretary of the Merit Systems Protection Board, Washington, D.C. 20419, no later than the date set forth above.

After providing an opportunity for response by other parties, the Board may grant a petition for review when it is established that:

(a) New and material evidence is available that, despite due diligence, was not available when the record was closed;

(b) The decision of the presiding official is based upon an erroneous interpretation of statute or regulation.

Under 5 U.S.C. 7703(b)(1) the appellant may petition the United States Court of Appeals for the appropriate circuit or the United States Court of Claims to review any final

decision of the Board provided the petition is filed no more than thirty (30) calendar days after receipt.

For the Board:

S. F. VESSER
Presiding Official

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

OWEN R. JONES	)	
	)	
v.	)	AT035109057
	)	
DEPARTMENT OF THE ARMY	)	

OPINION AND ORDER

Appellant was demoted from the position of Mobile Equipment Mechanic, WG-10, to the position of Automotive Worker, WG-8, through the application of reduction-in-force (RIF) procedures.

On appeal to the Atlanta Regional Office, appellant alleged that his former position had not in fact been abolished since he continued to perform the same duties and functions as he had before the RIF action was effected. Following a hearing, the presiding official issued an initial decision in which he found that the evidence presented by the agency was

insufficient to establish a prima facie case that the RIF regulations were properly invoked. See Losure v. Interstate Commerce Commission, 2 MSPB 361 (1980). Accordingly, the agency was ordered to reverse the RIF action.

In its petition for review, the agency contends that the presiding official erred in his interpretation of 5 C.F.R. §§351.201(a), 351.203(f), and 1201.56(c)(2). The agency cites various testimony in the hearing transcript, as well as documents contained in the record, and argues that it did show a proper basis under 5 C.F.R. §351.201(a) for the invocation of RIF procedures. Appellant, through his representative, disputes the agency's assertion of error and, again, argues that there has been no significant change in his duties.

The Board, having carefully reviewed the arguments presented by the parties, and the record established below, hereby GRANTS the

petition for review under 5 U.S.C. §7701(e)(1).

As we have held consistently, an agency may establish a prima facie case that it properly invoked RIF procedures by coming forward with evidence showing that the RIF was undertaken for any of the reasons specified in 5 C.F.R. §351.201(a). Losure, id. at 365; Hishikawa v. Department of Agriculture, MSPB Order No. SE035109012 (June 4, 1981); Rasheed v. Department of the Air Force, MSPB Order No. DA035109023 (June 5, 1981). Pursuant to §351.201(a), lack of work, shortage of funds, reorganization, reclassification due to change in duties, or the exercise of reemployment rights or restoration rights are permissible reasons justifying a RIF action. Reorganization is defined in 5 C.F.R. §351.203(g) as the planned elimination, addition, or redistribution of functions or duties within an organization.

In this case, copies of the agency's specific notice of RIF and retention register indicate that appellant's former position was abolished in keeping with the implementation of a classification study which limited the scope of functions performed within appellant's organization. This reason is fully consistent with the provisions of 5 C.F.R. §§351.201(a) and 351.203(g), and the agency had therefore established a prima facie case on this element of its decision. See Hishikawa, supra at 2 and Rasheed, supra at 2. Moreover, while appellant had argued that his duties and function had been unaffected by the RIF action, appellant admitted in his testimony at the hearing that he was no longer tearing down and rebuilding components and assemblies for engines, transmissions, and differentials. See Hearing Transcript at 80-81. This constituted a "major" change in appellant's duties as described in the job

descriptions for the positions of Mobile Equipment Mechanic, WG-10, and Automotive Worker, WG-8. See Hearing Exhibits No. 1 and 2. Accordingly, the Board finds that the preponderance of the evidence of record supports the agency's contention that appellant's demotion resulted from the implementation of a classification study which eliminated certain "major" duties from appellant's former WG-10 position.

Having found that the agency's invocation of the RIF procedures was proper, we will now address appellant's other assertions of error. Specifically, appellant argued at the hearing that his assignment rights under the RIF regulations had been improperly affected by the agency's failure to adequately credit his lengthy seniority and outstanding performance ratings.

The evidence of record shows that appellant had approximately eighteen (18) years of

service at the time the RIF action was effected, and that the agency fully credited appellant for this service. Pursuant to 5 C.F.R. §§351.501, 351.502, and 351.503. however, seniority or length of service is but one of several factors which must be considered when an agency determines the order in which to release employees from their competitive levels. Other key factors are: (1) the basis of the employee's tenure, i.e., whether the employee is a probationer or serving under a temporary appointment as contrasted to a career employee; and (2) whether the employee is entitled to veterans preference. In this case, the employee to whom appellant wishes to be compared, the only other employee in appellant's competitve level, had less seniority than appellant. Yet the other employee was a veteran. Appellant was properly reached for release from his competitive level. His retention standing affected his right to an

assignment involving displacement under 5 C.F.R. §351.703. On careful examination of the record, we find that the agency properly determined appellant's assignment rights in light of the fact that he was not entitled to veterans preference. We also find no error in the agency's failure to credit appellant's two previous outstanding performance ratings since appellant acknowledged that neither of these ratings was current on the date of the issuance of the specific notice of RIF. Hearing Transcript at 36; 5 C.F.R. §351.504.

In summary, our examination of the record shows no error in the agency's invocation and application of the RIF procedures in appellant's case. We therefore REVERSE the initial decision dated August 21, 1980, and SUSTAIN the agency's RIF action.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. §7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

FOR THE BOARD:

_____
(Date)

Washington, D.C.

_____
Robert E. Taylor
Secretary

No. 81-3666

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OWEN R. JONES, Petitioner, v. SECRETARY, DEPARTMENT OF THE ARMY, Respondent.	)	O R D E R

BEFORE: JONES and WELLFORD, Circuit Judges, and MILES*, District Judge.

During 1977, the respondent Department of the Army ordered a survey of a member of Army Reserve Commands and Area Maintenance Support Activities (AMSA), which operate in support of these Commands. After a review of the survey, there was issued a classification or re-classification guide to AMSA units, including the one at Louisville, Kentucky, which employed petitioner Jones, a longtime civilian worker. In connection with this program,

* Honorable Wendell A. Miles, Chief Judge, United States District Court for the Western District of Michigan, sitting by designation.

in 1980 a reduction-in-force was ordered by respondent, the effect of which was to reduce Jones' grade and position from that of Mobile Equipment Mechanic, WG-10, to Automotive Worker, WG-8, at Bowman Air Field. Jones appealed from the reduction-in-force directive which reduced his pay grade by a petition filed with the Merit Systems Protective Board pursuant to the Civil Service Reform Act of 1978 (Pub. Law No. 95-454, 5 USC §§1205, et seq.)

A reduction-in-force may be initiated, pursuant to CFR 351.201(a), for "lack of work, a shortage of funds, reorganization, reclassification due to change in duties, or the exercise of reemployment or restoration rights." Respondent contends that the reduction-in-force questioned by petitioner Jones came about as a result of the study and "reorganization" initiated some years before 1980. 5 CFR 351.203(f) defines "reorganization" as

"the planned elimination, addition or redistribution of functions or duties in an organization."

A hearing officer[1/], first considered Jones' petition and reached an "initial decision" to reverse the reduction-in-force action as to petitioner, who contended then, and still maintains, that his position, WG-10, had not in fact been abolished but that he was performing the same duties as a WG-8 as he formerly had been as a WG-10 before the reduction-in-force. The initial decision was based on Vesser's finding that a retention register and a copy of the reduction-in-force notice regarding "the implementation of a classification study are insufficient evidence to establish a prima facie case that the

1/ Presiding official S. F. Vesser conducted the hearing and signed the decision "for the Board" on 8/21/80.

reduction-in-force regulations were properly invoked...". The decision referred to appellee's apparent position that the WG-10 position was "abolished."

The respondent, through his civilian personnel office, gave notice of an intent to appeal the initial decision within the requisite time based on availability of "new and material evidence," and the claim that the "presiding official's decision is based upon an erroneous interpretation" and "does not agree with the written evidence already on record." The Board acted on the petition for review of the initial decision and observed that "there is no regulatory provision for acceptance of further materials submitted by the parties." A oral argument of this case, however, it was asserted that apparently new and additional evidence may have been considered by the Board, and that there was no objection to materials or responses submitted

by either party to the administrative appeal made by the Secretary. Since there was no objection indicated to the materials submitted as a part of the record in this case, this Court takes cognizance of the entire record which may or may not include something more than the "retention register" and "a copy of the reduction-in-force notice" referred to by officer Vesser as previously noted.

The Army's classification guide for AMSA positions refers specifically to a review of AMSA activities which "identified a number of civilian job classification problems," which included one that "equipment mechanics were not performing duties included in their official job descriptions," and "position structures that are top heavy with little use of sub-journeymen and helper positions, and a specific job classification errors." It was further noted that follow-up action was taken with an "in-depth position analysis of each

AMSA" conducted to "correct the problems identified by the survey," and to revise structures accordingly.

Among other consequences of this activity, specific job category guidance included the following observations:

1) "the WG-8 level represents the typical work of the activity; for this reason, leaders will normally be evaluated at the WL-8 level."

2) "the use of inspectors was used in less than 50% of the cases... the inspector position supports the WG-10 level.... (note in smaller AMSA's, the duties of the leader and inspector should be combined into one position)."

3) "the more complex work performed in the AMSA's will be accomplished by WG-9 level mechanics.... the majority of the mechanic positions should be classified no higher than WG-8, the highest grade attainable through performance of organization maintenance."

The job description of a WG-8 included as "major duties" the performance of repairs on a variety of "automotive, heavy mobile and powered support equipment." A WG-8 mechanic

was to complete repairs on this variety of equipment and "trouble-shoot" to assure "no further complications." He "works under responsibility of the shop foreman or mechanic of higher grade."

The Assistant Adjutant General, after this study, sent a communication in December of 1978 indicating that continued establishment of WG-10 level equipment mechanics was "improper" because "AMSA's have neither the capability nor are they authorized to perform maintenance functions which meet this level in the position classification standards," and "establishment of one leader position would be proper for most shops." He concluded that "there is substantial evidence that a number of jobs reflected in the proposed structures are misclassified;" that the "one foreman will be established to supervise shop operations;" that "leaders will normally be evaluated at the WL-8 level;" and that "the

WG-10 standardized job description will be cancelled." It was further "anticipated that all WG-10 mechanic positions will be abolished."

The WG-10 job description of major duties specified that one of this category "conducts acceptance, initial and final inspection of heavy mobile, automotive and powered support equipment." This duty of "acceptance" and "final inspection," when read together with other duties, imports more than a mechanic, more than a repairman, but one who supervises, handles part requirements for the job and determines whether the job can be handled by the particular AMSA shop. Finally, the appellee's agency concerned with the classification program indicated new job description for a WG-10 worker - "mobile equipment repair inspection," who would generally deal with

"all three major categories of equipment."[2/]

The recitation of the information in the record evidently was available to the Merit Systems Protection Board on its review. The Board found that respondent had indeed established a "prima facie case" on the record that petitioner's former position had been abolished "in keeping with the implementation of a classification study which limited the scope of functions performed within appellant's organization." The Board further found that, based on petitioner's own testimony, there had been a change in his duties in respect to tearing down and rebuilding components.

The question presented for this court's resolution, according to the statement in

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2/ See Richard Gardner, Assistant Adjutant General, communication 12-20-78; subject "Study of Area Maintenance Support Activities."

petitioner's brief, is whether the Board's ruling that the petitioner properly invoked the reduction-in-force was arbitrary, an abuse of discretion or not in accordance with law. Petitioner Jones submitted an affidavit which set out that none of his duties had changed. He argued that his regular duties never included tearing down and rebuilding components and assemblies of automotive and heavy equipment. It is true that Jones' testimony was to this effect: "when you get into your direct support, we don't tear down and rebuild components and assemblies anymore," but he added that "we only did that then (before) whenever the condition arose where it had to be done or they were in a hurry to get it done or what-have-you."

Jones' testimony was that this kind of work was normally done at Fort Knox, not at Bowman Field except on occasion; he admitted

that after the reorganization, the reduction-in-force, "we don't do that now," because "it was taken away from us." Officer Vesser concluded there was insufficient evidence to establish a prima facie case that the reduction-in-force regulations were properly invoked. The Board, on the other hand, found not only that a prima facie case was established by respondent but that "the preponderance of the evidence of record" supported respondent's contentions.

The Administrative Procedures Act, dealing with scope of review of administrative decisions by the courts in cases of this kind, prescribes a "substantial evidence" rule to be applied "on the record considered as a whole." See Universal Cinema Corp. v. N.L.R.B., 340 U.S. 474, 485-486, 488 (1950). The whole record in this case includes the report (the "initial decision") of the hearing officer. Universal Camera, 340 U.S. 493.

Where, as here, the hearing official and the Board reach different conclusions, the Supreme Court has stated:

> We do not require that the examiner's findings be given more weight than in reason and in the light of judicial experience they deserve. The "substantial evidence" standard is not modified in any way when the Board and its examiner disagree. We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in the particular case.

Universal Camera, 340 U.S. at pp. 496-497.

3/ 5 U.S.C. § 1001 et seq.

We conclude that there is substantial evidence to support the Board's conclusion that respondent made out a prima facie case that the Secretary properly invoked reduction-in-force procedures in this case.

We further conclude that there is substantial evidence to support its decision that there was a sufficient change in duties, or in the nature of duties assigned (even if not on a regular basis), to warrant the reduction in grade of appellant Jones.

The order of the Board will accordingly be AFFIRMED.

JONES, Circuit Judge, dissenting:

In view of the decision of the hearing officer in this case, who had the first-hand opportunity to hear the witnesses and

determine credibility, Judge Jones would reverse under the standards of Universal Camera Corp. v. N.L.R.B., 340 U.S. 474.

ENTERED BY ORDER OF THE COURT

Clerk

ISSUED AS MANDATE: October 27, 1983
COSTS: None

No. 81-3666

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OWEN R. JONES, Petitioner, v. SECRETARY, DEPARTMENT OF THE ARMY, Respondent.	)	O R D E R

Before: JONES and WELLFORD, Circuit Judges: MILES, District Judge.*

Following the entry of an order in this case affirming the order of the Merit Systems Protection Board, the petitioner, Jones, through his counsel, has filed a petition for rehearing. Upon consideration of the petition and the record in the cause, we are of the opinion that the petition for rehearing should be denied.

SO ORDERED.

ENTERED BY ORDER OF THE COURT

Clerk

* Honorable Wendell A. Miles, Chief Judge, United States District Judge for the Western District of Michigan, sitting by designation.

MR. JONES: That we will discuss off the record.

MR. ZALMAN: Oh! Okay. (Addressing witness):

Just a few more questions, Mr. Jones. We have indicated that going over your WG-10 performance specifications, your work job, that you are still performing those duties. Is that correct?

A. The same as we have been for the last eighteen years, yes, sir.

Q. And it's my understanding that just recently a group from your all's unit here were sent out to work on direct support maintenance. Is that correct?

A. In my opinion, yes.

Q. And you were told by Mr. St. John that the reason for this reduction was for the fact that you weren't going to be involved in direct support maintenance anymore?

A. That's correct.

Q. Was there another instance or was there an instance where a motor was put into a tank just recently here?

A. An engine transmission was put in a tank in Madisonville by two Wage Grade 8s, a shop foreman and a MATS man, G.S. MATS man, and the heavy mobile equipment repair was still in the Louisville shop performing his normal duties.

Q. Now it's also my understanding that the air support group is working with you here. Is that correct?

A. They work in the same building, yes.

Q. There was no reduction in force action by them.

A. That's correct.

Q. And was that for the purposes that they were still going to provide direct support maintenance?

A. Well, I really don't know why they are not involved in a RIF action, but they don't do any direct support maintenance either.

Q. Going back just briefly to Mr. Sam Dean, did you train Mr. Dean?

A. I helped train Mr. Dean, yes. I filled out his papers to help him get the job.

Q. Was he hired during 1970?

A. After the 1970 era. He was one of the last ones hired in. In other words, in early 1970 when the qualifications were dropped, Sam came in right after that. I don't know the exact date.

Q. His qualifications were accepted when the qualifications were lowered. Is that correct?

A. Well, Sam was qualified irregardless as a ground mechanic. He was a fine mechanic when he came in.

Q. In your discussions with Mr. St. John was there any review of your work record in regard to Mr. Dean's work record?

A. No.

MR. JONES: Yes, sir.

MR. ZALMAN: This is not an official document?

MR. JONES: No.

MR. ZALMAN: Who prepares that?

A. I think the shop foreman wrote those up off of the basic, if I'm not badly mistaken. The only basic difference I see right here that we're not doing now is, like I said, when you get into your direct support, we don't tear down and rebuild components and assemblies anymore, where we have done it in the past. We don't do that now. As far as the rest of it that I see it's all still about the same as we've always done. But there again, we only did that then whenever the condition arose where it had to be done

or they were in a hurry to get it done or what-have-you. The rest of the time why usually it went to Fort Knox.

MR. VESSER: Let the record show he's reading from Paragraph 1 under the major duties as contained in the position description of the WG-10 position.

Q. Everything else you perform?

A. Everything else is still about the same, we're still working on it, except they've added the word assist in the Wage Grade 8 there, where we assist somebody now instead of doing it ourselves.

Q. Do you assist anybody or do you still do it yourself?

A. We still do it ourselves.

MR. VESSER: Any further questions, Mr. Zalman?

MR. ZALMAN: No.

MR. VESSER: Mr. Jones?

MR. JONES: I have a question, if I may.

RE-CROSS-EXAMINATION BY MR. JONES

Q. You stated that you all used to tear down and rebuild these components and assemblies, engines, transmissions and everything?

A. I have rebuilt them right here at this field. That's exactly correct.

Q. You do not do that anymore?

A. We're not doing it now because it was taken away from us.

Q. And that is not in the new job description that you're on now. Right?

A. It's not on the job description I'm on now. That's correct.

Q. And you do not do it now.

A. Well, we haven't had the call to do it yet. If they bring it into the shop on an emergency on a Saturday or Sunday I'm sure we'd still do it.

Q. Has anyone told you that you will still do it?

A. No. Like I said, the occasion has not arose yet. We don't daily do it every day, no.

Q. But you did do it before and you're not doing it now.

A. We did it before and when it came in the shop. That's correct.

Q. No further questions.

RE-DIRECT EXAMINATION BY MR. ZALMAN

Q. Did you use to do that on a daily basis or an emergency basis?

A. On an as-required basis. Whenever it was there we'd fix it and whenever it wasn't there we did something else. Whenever it was there I fixed it.

MR. VESSER: Alright, Mr. Jones, you're excused from your capacity as a witness. Let's go off the record.

OFF-THE-RECORD DISCUSSION

MR. VESSER: Let the record show that I have requested the agency representative to furnish me a copy of the WG-10 position description that the appellant formerly encumbered and a copy of the WG-8 position which the appellant presently encumbers. These documents will be incorporated into the record. Are we ready now to proceed with closing remarks? Are you ready, Mr. Jones?

MR. JONES: Yes, we are.

MR. VESSER: Mr. Zalman? All right. We may proceed. Go ahead.

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Office of the Secretary
Merit Systems Protection Board
1717 H Street, N. W.
Washington, D. C. 20419

RE: Owen Jones
Docket No. AT 035109057

Dear Sir:

In response to the Petition for Review submitted by Mr. George Lundy, I wish to advise the Board that the new and material evidence that is stated as being available has not been submitted for my review or my client's review, nor has it been brought to our attention. My client and I are very concerned that the new and material evidence that may be brought to the Board is in the form of statements that are being coerced from the employees at the 83rd ARCOM.

Conclusive evidence as of the time of the hearing without any duress showed that Mr. Jones, as well as his co-workers, were performing the same tasks as they had done prior to the reduction-in-force action.

My client, pursuant to his Affidavit hereto attached, has indicated that he was told by a shop foreman that he must sign the Job Performance Review and that he did not have a choice. In spite of this, my client had

the courage to stand firm to his commitments. As you will also note, my client has indicated that the same type of tactic was used on his co-workers in which they had no freedom in making a decision as to their signature.

It is my hope and belief that we are still living in a Democratic society and that the Army's eagerness to win their Appeal will not take the toll of those rights guaranteed by the U. S. Constitution.

It is also my understanding that the Army is appealing on the basis that the presiding officer made an erroneous interpretation of FPM 351. I would appreciate the opportunity to respond to his comments subsequent to receiving specific allegations as to why the presiding officer was in error.

Very truly yours,

Bruce P. Zalman
hrd

attachment

END OF DOCKET